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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	ET Docket No. 95-183
Regarding the 37.0 - 38.6 GHz and	)	RM-8553
38.6 - 40.0 GHz Bands	)	
	)	
Implementation of Section 309(j) of the	)	PP Docket No. 93-253
Communications Act — Competitive	)	
Bidding, 37.0 - 38.6 and 38.6 - 40.0 GHz	)	

To: The Commission

PETITION FOR RECONSIDERATION OF COLUMBIA MILLIMETER COMMUNICATIONS, L.P.

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March 9, 1998

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SUMMARY

Columbia Millimeter Communications, L.P. ("CMC") supports many of the rule changes adopted in the *Report and Order* but seeks partial reconsideration on two significant issues. First, the Commission should reconsider its decision to accelerate the deadline for incumbent licensees to file license renewal applications. The adoption of new rule Section 101.15(c) was inconsistent with the notice-and-comment rulemaking requirements of the Administrative Procedure Act, and the rule provision is inconsistent with the goals stated in the *NPRM* and confirmed in the *Report and Order*.

Second, the Commission should reconsider its decision to dismiss all pending applications that were mutually exclusive as of the date the *NPRM* was released. Reconsideration is justified by the Commission's inconsistent enforcement of its rules and policies as they affect pending 39 GHz applications. The Commission should clarify its treatment of pending applications, and in the interest of fairness and efficiency, permit applicants a brief period of time to dismiss or amend MX applications, and grant those applications that are no longer MX when the settlement period ends.

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To: The Commission

PETITION FOR RECONSIDERATION

Columbia Millimeter Communications, L.P. ("CMC"), by its attorneys and pursuant to Section 1.429(a) of the Commission's Rules, hereby requests that the Commission reconsider in part the *Report and Order*[1/] in the above-captioned proceeding. The following is respectfully shown:

I. Introduction

The licensing and development of the 38,600 - 40,000 MHz ("39 GHz") frequency band — a portion of the radio spectrum that was fallow and believed to have no commercial purposes just a decade ago — is a regulatory success of which the

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1/ *Report and Order and Second Notice of Proposed Rulemaking*, FCC 97-391 (released November 3, 1997), 63 Fed. Reg. 6079 (Feb. 6, 1998).

Commission should be very proud. Major new technologies, markets, and competitors have grown up in just a few years. The growing market for innovative broadband wireless service offerings in the 39 GHz band, including competitive local exchange and competitive access services, serves as compelling evidence of how competition can develop when the Commission regulates with a light hand. CMC itself has initiated operations in approximately 50 different service areas throughout the United States.

In the *Notice of Proposed Rulemaking and Order* ("*NPRM and Order*")[2/] in this proceeding, the Commission made several proposals which, if adopted, could have severely curtailed development of the 39 GHz band. The Commission wisely abandoned the more heavy-handed proposals and in the *Report and Order* adopted flexible rules which generally continue a consistent approach of minimal regulation which will serve the public interest by allowing continued innovative uses of 39 GHz spectrum.

CMC strongly supports many of the rule changes adopted in the *Report and Order* but seeks reconsideration on two significant issues. First, the Commission should reconsider its decision to accelerate the deadline for incumbent licensees to file license renewal applications. Second, the Commission should reconsider its decision to dismiss all pending applications that were mutually exclusive ("MX") as of the date the *NPRM* was released, and instead accord applicants a brief period of time to dismiss or

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2/ ET Docket No. 95-183, *Notice of Proposed Rulemaking and Order*, 11 FCC Rcd 4930 (1995).

amend MX applications, and grant those applications that are no longer MX when the settlement period ends.

II. The Existing License Renewal Deadline Should Not Be Changed

All 39 GHz licenses granted to date bear an expiration date of February 1, 2001. Under existing rules, licensees must file applications for renewal between 30 and 60 days prior to the end of the license term (i.e., between December 1, 2000 and January 1, 2001). 47 C.F.R. § 101.15(d) (formerly 47 C.F.R. § 21.11(c)). This rule was in effect when all outstanding 39 GHz licenses were granted and was not changed when the Commission revised its general rules governing all fixed microwave radio services in February 1996.[3/]

In the *Report and Order*, the Commission radically altered the license renewal rule in a manner that harms incumbent 39 GHz licensees. The new rule requires licensees to file a renewal application 18 months, rather than one to two months, before the end of the license term (i.e., by August 1, 1999 for incumbent licensees). New Section 101.15(c) states:

> For authorizations in the 38.6 - 40.0 GHz band, the licensee must file FCC Form XXX eighteen months prior to the expiration date of the license sought to be renewed. See Section 101.17 for renewal requirements for the 38.6 - 40.0 GHz frequency band.

3/ *In the Matter of Reorganization and Revision of Parts 1, 2, 21 and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services*, WT Docket No. 94-148, *Report and Order*, 11 FCC Rcd 13449 (1996).

Section 101.17, also adopted in the *Report and Order*, sets forth the "performance requirements" for all 39 GHz licensees. Specifically, 39 GHz licensees must "demonstrate substantial service at the time of license renewal." 47 C.F.R. § 101.17(a).

CMC does not object to the newly adopted substantive performance requirements or to the new requirement that licensees must demonstrate substantial service at the time of license renewal. 47 C.F.R. § 101.17(a). CMC does object, however, to the requirement that licensees file for license renewal 18 months before the license term expires, **which does not apply to any other licensees providing service under Part 101.** Indeed, no other wireless service provider is subject to a comparable early-filing requirement.

In promulgating Section 101.15(c), the Commission failed to abide by statutory requirements applicable in notice-and-comment rulemaking proceedings. The Administrative Procedure Act ("APA") requires that an agency "shall include" in a notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[4/] An NPRM or a subsequent release "must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based."[5/] With respect to new Section 101.15(c), the *NPRM* — which made no mention of license renewal either in its text or in the appendix

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4/ 5 U.S.C. § 553(b).

5/ *Home Box Office Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977), *cert. denied, 434 U.S. 829.*

containing proposed rule language — was inadequate to satisfy APA requirements. The *NPRM* did not reasonably alert those subject to the new rule that they would be compelled to seek renewal more than one year in advance of the date required by existing rules.

The *NPRM* did propose that licensees would have 18 months from adoption of the *Report and Order* to certify construction of four links per hundred square miles, subject to the penalty of license cancellation, and also proposed alternative construction obligations. *NPRM*, para. 105. These proposals were uniformly opposed, with several commenters noting that compliance would be extremely costly and burdensome to the emerging 39 GHz industry.[6/] "Based on the record in this proceeding," *Report and Order*, para. 42, the Commission "declined to adopt any of the build-out proposals we made for incumbent 39 GHz licensees in the *NPRM*." *Id.*, para. 43. Having disavowed the *NPRM*'s buildout proposals, the Commission cannot argue that those proposals support a rule provision addressing a different subject (license renewal) that was not even mentioned in the *NPRM*. Courts consistently have set aside final rules based on comparable defects in the purported notice given by an agency.[7/] Compounding the error is the fact that the *Report and Order* did not even acknowledge

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6/ *See, e.g.*, Comments cited at *Report and Order* n.99.

7/ *See, e.g., American Frozen Food Inst. v. Train*, 539 F.2d 107, 135 (D.C. Cir. 1976) (subject of adopted rule not mentioned in the NPRM).

that the renewal filing deadline was accelerated and offered no explanation for doing so. *See Report and Order*, paras. 47-48.

In the *NPRM*, the Commission stated that its goal with respect to performance requirements was to avoid "harming existing 39 GHz licensees who are responsibly developing the spectrum they have been assigned." *NPRM*, para. 106. "Based on the record" the Commission abandoned its Draconian proposals and adopted performance requirements consistent with the stated goal. The accelerated renewal deadline, however, is inconsistent with that goal. No valid reason exists for altering the expectations of incumbent licensees, whose business plans will be disrupted by an accelerated renewal deadline. Incumbents also will be at a disadvantage to future licensees who acquire licenses at auction, because future licensees will receive a ten-year license term with eight-and-one-half years to meet the performance requirements, compared to the two- to five-year period for incumbents, depending upon the date of license.

For the foregoing reasons, Section 101.15(c) should be revised to eliminate the distinction between 39 GHz licensees and other licensees subject to the rule.

III. A Brief Period for Applicants to Resolve Pending Mutually Exclusive Applications Should Be Allowed

In the *Report and Order*, the Commission concluded that all applications that are mutually exclusive will be dismissed. *Report and Order*, para. 87.[8/] For the reasons set forth below, the Commission must reconsider this decision, and should immediately open a brief period during which mutually exclusive applicants may file amendments to resolve conflicts.

A. Substantial Uncertainty Exists About What Processing Rules and Policies Are Being Applied

The approximately five-year period during which 39 GHz licenses have been issued has been marked by ever-changing processing "policies" and inconsistent application of those policies and applicable Commission rules. As a result, applicants are uncertain how their applications have been or will be processed, or what actions are permissible. Clarifying these uncertainties and allowing applicants a brief period to resolve MXs will result in fair treatment of all parties.

Prior to September 1994, applicants were permitted to request an unlimited number of 39 GHz channel pairs and could request any size service area,

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8/ To CMC's knowledge, the Commission has not taken action dismissing such applications. Consequently, because these dismissals do not yet constitute a "final action," 47 C.F.R. § 1.429(a), CMC cannot ask the Commission to reconsider the dismissals.

subject to a showing of need.[9/] The Commission granted hundreds of licenses pursuant to these rules; in some cases, four channels were granted to a single applicant for one service area.[10/]

In September 1994, a new policy was announced which generally limited applicants to a single channel pair, restricted the size of the service area that could be requested, and required applicants to make showings not otherwise required by governing Commission rules.[11/] The *Policy Statement* required that pending applications be amended to conform with the new guidelines, and stated that "[n]ew applicants who fail to submit the[] required showings will have their application(s) returned. Applicants with applications already on file failing to provide these necessary showings within 30 days of this public notice will have their application(s) dismissed without prejudice." Most, but not all, applicants amended their applications to conform to the *Policy Statement.* Similarly, most, but not all, later-filed applications complied with the *Policy Statement.*

The Commission's processing actions reflect numerous inconsistencies with the *Policy Statement.* For example, applications that requested multiple channel

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9/ 47 C.F.R. §§ 21.701(j), 21.711 (1994).

10/ *E.g.*, File No. 2726-CF-P/L-93.

11/ *See Public Notice*, Mimeo No. 44787, "Common Carrier Bureau Established Policy Governing the Assignment of Frequencies in the 38 GHz and Other Bands to Be Used in Conjunction with PCS Support Communications," released September 16, 1994 (*"Policy Statement"*). The legal effect of the *Policy Statement*, for which there was no notice and comment period, and which was not published in the Federal Register, also is uncertain.

pairs and were filed prior to the release of the *Policy Statement*, but were not amended, were not dismissed; many have been granted.[12/] Other applications for multiple channels were "amended" by Commission action, with one channel pair granted and other channels pairs dismissed.[13/] In still other instances, applications for multiple channel pairs remain pending before the Commission,[14/] with no indication of what processing rules and policies apply.

On November 13, 1995, the Commission announced a freeze on the filing of new 39 GHz applications, noting that it intended to propose new licensing rules for the spectrum.[15/] On December 15, 1995, the Commission released the *NPRM and Order*, which announced a new "interim 39 GHz licensing policy," *NPRM and Order*, Part III.M, pursuant to which "[p]ending applications will be processed if (1) they were not mutually exclusive with other applications at the time of the [November 13, 1995] *Order*, and (2) the 60-day period for filing mutually exclusive applications expired prior to November 13, 1995." *Id.*, para. 122. The Commission ordered that the processing and disposition of "all other pending applications (i.e., those that were subject to mutual

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12/ *E.g.*, *Public Notice*, Report No. 1975, released February 10, 1998, p. 175.

13/ *E.g.*, Letter from Michael B. Hayden, Chief, Microwave Branch, to Commco LLC, June 21, 1995, Ref. 7140-12/1700B.

14/ *E.g.*, File No. 9505525; File No. 9509297. In some cases, petitions to deny or partially dismiss such applications for non-compliance with the Commission's rules and policies never have been acted upon. *See, e.g.*, File No. 9509049.

15/ *Order*, RM-8553, released November 13, 1995.

exclusivity or still within the 60-day period as of November 13) ... be held in abeyance during the pendency of this proceeding." *Id.*, paras. 123, 125. The Commission also decided to hold in abeyance all amendments to pending applications, including amendments filed as of right that resolved mutual exclusivity and were filed between November 13, 1995 and December 15, 1995. *Id.*, paras. 124, 125.

Like the *Policy Statement*, the "interim 39 GHz licensing policy" has been applied inconsistently. Sixteen months after the *NPRM and Order* was released, the Commission reconsidered its decision to hold in abeyance amendments filed between November 13 and December 15, 1995 and announced that such amendments would be processed.[16/] And, although the January 1997 *MO&O* affirmed the "interim policy" of "continu[ing] to hold pending, mutually exclusive applications in abeyance until we issue a Report and Order resolving the substantive issues of this proceeding,"[17/] *MO&O*, n.34, this decision also has not been applied consistently. Applications that were mutually exclusive on December 15, 1995 in fact have been granted.[18/]

16/ *Memorandum Opinion and Order*, FCC 96-486, released January 17, 1997 ("*MO&O*"), para. 17 & n.43. In doing so, the Commission rejected petitions seeking reconsideration of other aspects of the "interim processing policy," and stated that challenges to the interim licensing policy were premature because no final actions had yet been taken on pending applications. *Id.*, paras. 11, 15, 16.

17/ *MO&O*, n. 34; *see also id.*, para. 2 ("We will continue to hold in abeyance all pending mutually exclusive applications, unless the mutual exclusivity was resolved by an amendment of right filed before December 15, 1995.").

18/ *E.g.*, File No. 9504870.

The *Report and Order* created still more processing uncertainties. The Commission concluded that "the best approach for processing pending mutually exclusive applications is to dismiss them without prejudice." *Report and Order*, para. 90. In reaching this conclusion, the Commission failed to acknowledge the processing decisions (which are now final) taken after December 15, 1995 that were inconsistent with the interim policy and with the ultimate decision. The Commission then caused further confusion by stating that it would process "partially mutually exclusive applications," *Report and Order*, para. 97, which were defined as "applications [that] request more than one frequency pair, some of which are mutually exclusive with frequencies requested in other applications and some of which are not mutually exclusive." *Id.*

The Commission must clarify its 39 GHz processing rules and policies, including its new policy regarding "partially mutually exclusive" applications.[19/] First, the Commission must provide a basis for distinguishing between one class of "partially" MX applications and other classes of MX applications. Second, the Commission must make available its entire database so that interested parties may determine whether the reference to "seven" partially MX applications (*Report and Order*, para. 97) is accurate; to date, the Commission has released information about the referenced applications only

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19/ Reasoned decision-making requires that when an agency changes course it "articulate[s] permissible reasons for that change." *Southern Pacific Transp. Co. v. ICC*, 69 F.3d 583, 594 (D.C. Cir. 1995) (internal quotations and citations omitted).

in response to a Freedom of Information Act request.[20/] Third, the Commission must clarify whether this new policy effectively constitutes a determination that the *Policy Statement* will not be enforced, in order that affected applicants can determine their legal rights. Fourth, the Commission must acknowledge whether, as promised in the *MO&O*, at n.34, "all applications that are dismissible because of noncompliance with our rules or policies will be dismissed regardless of how we ultimately decide to treat frozen applications," and should identify all such applications. Fifth, the Commission must clarify its basis for granting some, but not all, applications that were MX as of December 15, 1995. Sixth, the Commission must address the legal issues that remain with respect to the pending applications (*see* Part III.B, *infra*).

CMC is not advocating that the Commission take any action with respect to any specific application. Rather, CMC believes that the processing of 39 GHz applications has proceeded in an irrational, arbitrary, and capricious manner that defies logical explanation. The Commission must apply its rules and policies consistently and should, therefore, reconsider its decision to dismiss pending MX applications. Dismissal of these applications will result in the filing of numerous further petitions for reconsideration, requiring review of myriad legal and factually distinct arguments, and a continuation of ad hoc processing decisions.

20/ Letter from H. Zeiler, Deputy Chief, Public Safety and Private Wireless Division, to R. Taylor, Esq., January 5, 1998, Ref. 2000F/JPF, FOIA 97-344. A review of that response indicates that the referenced applications do not meet any single uniform definition of "partially" MX.

B. Significant Legal Issues Have Not Been Resolved

In the *Report and Order*, the Commission acknowledged, but failed to address, numerous arguments opposing the dismissal of pending applications and suggesting alternative processing procedures. For example, the Commission noted that "[s]ome commenters ... ask that the Commission dismiss as defective" applications for multiple channel pairs. *Report and Order*, para. 89 & n. 176. Similarly, commenters asked the Commission to enforce specific application processing rules. *Id.*, para. 92 & n.182. The Commission offered no reason for rejecting these suggestions, and did not even acknowledge that there are outstanding petitions that raise identical issues. Furthermore, the Commission neither acknowledged nor addressed arguments raised in petitions for reconsideration of the January 1997 *MO&O,* including the claim that the Commission may not prevent the filing of amendments as of right under the rules.[21/] The Commission also should have, but did not, consider the arguments that it dismissed as premature in the *MO&O* on the grounds that no final action had occurred. Failure to consider and fully address these arguments is contrary to the Commission's obligations under the APA.

The Commission cited two reasons for its decision to dismiss pending MX applications: (1) in order to "optimize the public interest by promoting fair and efficient licensing practices," that is, by holding auctions rather than comparative hearings, *Report*

21/ *See, e.g.,* Petition for Reconsideration of BizTel, Inc., April 1, 1997, at pp. 17, 20, 21; Petition for Partial Reconsideration of ELAR Cellular, February 18, 1997.

and Order, para. 90; and (2) because applicants with pending applications "had ample opportunity to file such amendments prior to the commencement of this rule making" and the Commission "is not convinced that parties who have not already entered such agreements will successfully accomplish such agreements now." *Id.* Neither of these reasons is supported by the record.

With respect to the first rationale, the public interest can best be served by first applying fair and efficient licensing practices to pending applications. Only when these applications are disposed of in a rational and consistent manner can the Commission proceed to implement a new set of licensing practices. In light of the uncertainty surrounding pending 39 GHz applications, it makes no sense even to consider holding an auction for future licenses until the Commission can be certain that it has treated all pending applications fairly. Nor is it the case that the Commission's choice is between dismissing all applications and holding comparative hearings to resolve MXs. *Report and Order*, para. 90. The middle road is to allow applicants to resolve conflicts among themselves. This approach was specifically contemplated by the rules that were in effect when all pending applications were filed and which have been consistently followed by applicants.

The second rationale is not supported by the record. In fact, most MX 39 GHz applications were resolved by the parties. The reasons why the remaining MXs were not resolved by December 15, 1995 vary: in part, delay was caused by the

Commission's own inconsistent application of processing rules and policies; in some cases, the parties did not have sufficient time to identify and resolve MXs before the Commission announced its "interim policy" of not allowing parties to resolve MXs. In any event, CMC believes that a large number of MXs in fact have been resolved since December 15, 1995, and that amendments have been filed at the Commission and need only to be processed.

C. The Public Interest Would Be Served By Permitting Prompt Resolution of Pending MX Applications

The Commission's overriding goal in licensing proceedings should be to ensure prompt delivery of service to the public. This goal has greater urgency when the applicants seek to offer services in competition with entrenched providers. Here, the Commission can achieve this goal by allowing applicants to resolve MXs. Notably, the 39 GHz rules in effect at the time the processing freeze was announced were extremely effective in achieving this result. Applicants' diligence in resolving MX applications has resulted in the grants of numerous licenses, and licensees consistently have complied with their performance obligations and have placed hundreds of new facilities in operation.

CMC believes that the Commission's goals in adopting new licensing rules for the 39 GHz band can be accomplished promptly by clarifying the governing processing rules and policies and allowing MX applicants a brief period to resolve conflicting applications. If the Commission fails to do so, costly and time-consuming litigation is certain. On the other hand, if all processing issues related to pending

applications are resolved promptly — as CMC believes they can be by the applicants themselves[22] — then the Commission may hold an auction for 39 GHz BTA licenses promptly without the very real likelihood that the auction will be stayed or reversed pending appeal of the Commission's arbitrary processing of pending applications.

Affirmatively granting applicants an opportunity to resolve conflicts and dismissing applications that remain MX only if not resolved by the end of the resolution period, also is consistent with the Commission's statutory obligation "in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."[23] In the past, the Commission consistently has confirmed that settlements by applicants in licensing proceedings is in the public interest, and the rules expressly provide for private conflict resolutions.[24] Proceeding to auction after all pending applications have been finally disposed of in this manner will substantially reduce the likelihood that the Commission's actions will be challenged as arbitrary, capricious, and not in the public interest.

22/ The number of CMC's applications that remain pending is not large. Many of these MXs can be, and already have been, resolved by simple engineering solutions used successfully in the past. Amendments effectuating these conflict resolutions can be filed and processed immediately. CMC believes most other pending 39 GHZ applications can be similarly resolved.

23/ 47 U.S.C. § 309(j)(6)(E) (emphasis added).

24/ 47 C.F.R. §§ 101.41, 101.45(f)(2).

In sum, CMC believes that the public interest will be served by allowing a brief period — 30 to 60 days should be adequate — for applicants to resolve pending MX applications, dismissing without prejudice all applications not resolved by the end of that period, and granting the remaining applications that are not mutually exclusive.

IV. Conclusion

WHEREFORE, the foregoing premises duly considered, Columbia Millimeter Communications, L.P. respectfully requests that the Commission promptly revise its rules consistent with the foregoing.

Respectfully submitted,

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March 9, 1998

WDC-79963v1

CERTIFICATE OF SERVICE

I, Michelle A. Harris, a secretary with the law firm of Paul, Hastings, Janofsky & Walker LLP, hereby certify that I have on this 9th day of March, 1998, caused a true and correct copy of the foregoing Petition for Reconsideration of Columbia Millimeter Communications, L.P. to be served by hand on the following:

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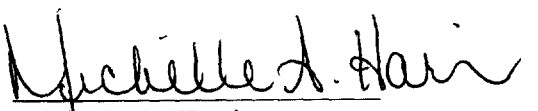

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